76-4771

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976
No. 76-

MARY F. McNAMARA and ANARITA McNAMARA,

Petitioners

Versus

~~IN RE: CONDEMNATION OF LANDS IN CITY OF SCRANTON, COUNTY OF LACKAWANNA, STATE OF PENNSYLVANIA~~

and

TCS-1, et al. Respondents

~~*Intervening Appellee*~~

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Hop Bottom, Pennsylvania
18824
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*Please note that only procedural cases reported subsequent to 1974 are cited as authorities.

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

MARY F. McNAMARA and ANARITA McNAMARA,

Petitioners

versus

IN RE: CONDEMNATION OF LANDS IN CITY OF SCRANTON, COUNTY OF LACKAWANNA, STATE OF PENNSYLVANIA

and

TCS-1

Intervening Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioners, Mary F. McNamara and Anarita McNamara, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania affirming the judgment of the Court of Common Pleas of Lackawanna County, Pennsylvania.

OPINIONS BELOW

The Petitioners appeal to the Commonwealth Court of Pennsylvania No. 1522 C. D. 1974 in order to review the decision of the Common Pleas Court of Lackawanna County, Pennsylvania dismissing their preliminary objections to a rule of possession averring that the condemning authority was estopped to acquire the previously condemned property by reason of the fact that the Scranton Redevelopment Authority had previously published a statement that they did not choose to take title to the McNamara property. The Lackawanna County Court dismissed the Petitioners' preliminary objections "for lack of merit on their face," The preliminary objections presented to the Lackawanna Court are printed in the appendix to this petition at pages 4a-7a. The order of the Lackawanna County Court is printed in the appendix to this petition at page 8a. This order was not printed in any official report.

An appeal to the Commonwealth Court of Pennsylvania resulted in an affirmance of the Lackawanna County Court judgment. The affirming judgment of the Commonwealth Court of Pennsylvania is printed in the appendix to this petition at page 9a. There was no publication in any official report of this judgment.

The Petitioners filed a timely petition for allowance of appeal to No. 2153 Allocatur Docket in the Supreme Court of Pennsylvania.

By letter dated July 12, 1976 the Prothonotary of the Supreme Court of Pennsylvania informed petitioners' counsel that the court had entered the following order on the petition for reconsideration of denial of petition for allowance of appeal from the Commonwealth Court of Pennsylvania: "July 8, 1976: Petition Denied. Per Curiam". This order is printed in the appendix of this petition at page 1a.

This order was never published in any official report.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 28, 1976. A timely petition for reconsideration resulted in the letter of July 12, 1976 informing Petitioners' counsel that the Court had entered the following order on the petition for reconsideration of denial of petition for allowance of appeal from Commonwealth Court: "July 8, 1976 Petition Denied. Per Curiam".

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3). Petitioners are citizens of the United States.

QUESTIONS PRESENTED

A. Whether an error which affected Petitioners' substantial Fourteenth Amendment Due Process Rights of Equal Protection of Laws was violated by the Lackawanna County Court precluding any testimony or depositions to rebut or verify the facts admitted by the Condemnors' failure to answer the verified facts in the Petitioners' preliminary objections which were endorsed with a "notice to plead" as required by Rule 1028 (c) (P. R. C. P.), approved by the Supreme Court of Pennsylvania?

B. Whether the Petitioners were denied their Fourteenth Amendment Due Process Rights to a Fair Trial when the Court precluded any testimony or depositions?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 10, 1972 Petitioners joined with other condemnees of the Scranton Redevelopment Authority to assert a class action with the purpose in mind of acquiring a just result for members of the class action and applied for an injunction to stop further actions of the Redevelopment Authority. This case resulted in an unfavourable judgment to the petitioners except for the fact that the judgment of that court required that Scranton Redevelopment Authority conform to federal laws, i.e. that the Petitioners would be entitled to all of the benefits of the federal laws prior to acquisition of the Petitioners' property. The judgment of that court is printed in the appendix of this petition at pages 2a-3a. The Petitioners are unable to locate any printed publication of that judgment.

In an action filed to 15 November Term, 1973,TCS-1, a non-profit corporation sued the Scranton Redevelopment Authority to acquire the Petitioners' lot in specific performance of a contract made November 12, 1969 for the purchase price of $1000.00 when the house would be demolished. The Petitioners aver that the contract for which TCS-1 was suing the Scranton Redevelopment Authority contains a clause which can terminate that contract by a registered letter.

From June 27, 1972, the date of the United States District Court Judge Muir's decision until September 30, 1974, the only action taken by the Scranton Redevelopment Authority was negotiation to attempt to relocate the

Petitioners' Victorian home on some other lot which the Petitioners approved. The Petitioners approved removal of house to a specific lot and immediately the Scranton Redevelopment Authority concluded negotiations without any action on removal of house. Since the handing down of Judge Muir's decision the Scranton Redevelopment Authority has represented to your Petitioners that they would not be able to conform to the requirements of federal law and, therefore, did not choose to acquire the McNamara property by eminent domain.

It is noted that TCS-1, a non-profit corporation, has no legal authority to acquire property by exerting the right of eminent domain. However, TCS-1, as an intervening appellee, since Commonwealth Court, has taken control of all legal actions in the Commonwealth Court and in the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

Where essential facts appear necessary by reason of Petitioners' presenting preliminary objections to the court which are verified and endorsed with a "notice to plead" requiring an answer by the respondent in such case under Pennsylvania law the verified facts are admitted by the respondent and when the court precludes testimony or depositions and dismisses preliminary objections "for lack of merit on their face" such action by the court is a denial of the Petitioners' right of equal protection of laws under the Fourteenth Amendment and should result in remanding the case to the Lackawanna County Court.

***Schaffer v. Batyko*, 227 Pa. Superior Ct. 62 (1974) held that "Where an inquiry into essential facts appears necessary, a party should not be deprived of the opportunity of presenting the disputed facts to a fact finder. . ." (Citations omitted.)**

"A court shall determine promptly all preliminary objections. If an issue of fact is raised, the court shall take evidence by deposition or otherwise. P.R.C.P. 1028-(c). A preliminary objection is a pleading and an answer to it is equivalent to a defendant's answer to a plaintiff's complaint subject to all the rules of pleading of the complaint. P.R.C.P. 1017. In the instant case the insurance company endorsed its preliminary objections requiring an answer from the plaintiff. The plaintiff answered, alleging facts which, if true, could very well protect plaintiff against dismissal of his cause of action. In the light of the

affidavit of acceptance of service it appears that the insurance carrier had no authority or permission from defendant to attack the lack of service of the complaint. *This matter together with other allegations set forth in plaintiff's answer should have been looked into by the lower Court.*" (Emphasis supplied.)

The Petitioners supplied emphasis to demonstrate that it is still required by the law of Pennsylvania to accept testimony or depositions in order to determine any disputed facts made necessary by the preliminary objections.

If the Lackawanna County Court had allowed Petitioners to produce depositions or testimony to prove the facts necessary to estop the condemnor there would not be any need for further litigation.

Standard Machine & Equipment Company v. Hartford Accident & Indemnity Co., 70 D. & C. 2d 110 (1974), held that preliminary objections endorsed with a notice to plead, required a responsive reply by the other party, unless the properly pleaded averments of fact are to be taken as admitted.

Firing v. Kephart, 336 A.2d 470, 18 Pa. Commonwealth Ct. 578 (1975), holds that when the sustaining of defendant's preliminary objections will result in a denial of plaintiffs' claim or dismissal of plaintiffs' suit, preliminary objections should be sustained only in cases which are clear and free from doubt.

The instant case is one which would be clear and free from doubt in the event the Lackawanna County Court allowed depositions or testimony in order to prove the averred facts.

CONCLUSION

Petitioners were denied their Fourteenth Amendment right of equal protection of laws in that under the case law of Pennsylvania "a party should not be deprived of the opportunity of presenting the disputed facts to a fact-finder". Because substantial questions have been raised in this case concerning constitutional questions, the fair administration of civil law, the Petitioners respectfully request this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

HENRY M. BIGLAN,
Attorney for Petitioners

Order of Supreme Court of Pennsylvania

SUPREME COURT OF PENNSYLVANIA
Eastern District

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia 19107
July 12, 1976

Henry M. Biglan, Esq.,
Star Route
Hop Bottom, Pa. 18824

In re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania, and TCS-1
Intervening Appellee.
Petition of: Mary F. McNamara
No. 2153 Allocatur Docket

Dear Mr. Biglan:

Please be advised that the Court has entered the following Order on the Petition for Reconsideration of Denial of Petition for Allowance of Appeal from Commonwealth Court, in the above captioned matter:

"July 8, 1976
Petition Denied
Per Curiam"

Very truly yours,
(s) Sally Mrvos
L.
Prothonotary

SMM:mb

CC: Leo A. Southard, Esq.,
Joseph E. Gallagher, Esq.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. 71-415

Anarita McNamara for Herself and for All Others Similarly Situated

and

Mary F. McNamara, for Herself and for All Others Similarly Situated

vs.

Department of Housing and Urban Development, an Agency of the United States

and

George Romney, Secretary, Department of Housing and Urban Development

and

Warren P. Phelan, Regional Administrator, Region III

and

Scranton Redevelopment Authority, Edward Cosgrove, Chairman, Donald Harris, Executive Director

---

OPINION

Muir, District Judge.

* * * * * * *

Title II of the Uniform Relocation Act, which deals with relocation assistance, does apply to any displacement occurring on or after the effective date of the Act. The

plaintiffs would be entitled to the assistance and benefits provided for under Title II. There has been no allegation in the Complaint, nor any evidence adduced at trial, to indicate that the Authority has not made any payments to any displacee to which he was entitled.

Section 205 (c) of the Uniform Relocation Act sets forth the requirements for a relocation advisory program. These provisions are substantially similar to the requirements of Section 105 (c) (1) of the Housing Act of 1949. The Authority must provide services to its displacees as so prescribed. When the question of the right of the Authority to take plaintiffs' property is finally settled, plaintiffs will be entitled to these services.

Plaintiffs have not produced a single displacee who has not been provided with the resources, services, or benefits to which he is entitled.

* * * * * * * *

Muir,
United States District Judge

Dated: June 27, 1972

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

No. 562 March Term, 1969

In Re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania

Mary F. McNamara and Anarita McNamara, 518 Adams Avenue, Ward 9, Block 30, Lots 16A & 17

PRELIMINARY OBJECTIONS

MOTION TO STRIKE OFF PLEADING:

1. The Condemnor has no legal right to sue for possession until it has conformed to the mandate of the Federal Statute 91-646 (Uniform Relocation Assistance and Real Property Assistance Act of 1970.)

CONDEMNOR IS ESTOPPED TO ACQUIRE POSSESSION:

2. After becoming Chairman of the Board of the Scranton Redevelopment Authority, Mr. James McNulty confirmed to Attorney Henry M. Biglan that the Scranton Redevelopment Authority did not choose to take title to the McNamara property. He stated that the statement attributed to him in the newspapers was accurate.

3. The entity known as TCS-1 is not registered in Lackawanna County or Harrisburg as a corporation and therefore did not have the legal power to enter into a contract with the condemnor to buy the McNamara land.

4. Negotiations with the Condemnor:

The Condemnees would have agreed to remove the McNamara building to the Brooks lot in the four hundred block of Jefferson Avenue. This was made impossible by reason of the fact that the Scranton Redevelopment Authority told the Condemnees and their attorney that the Brooks lot would be unavailable because that lot was part of the Brooks estate. The Condemnees now have learned that said Brooks lot has been sold to John Kelly, a former Member of Scranton Neighbors and presently real estate agent for Midtown Apartments which were built by Scranton Neighbors.

Later the Scranton Redevelopment Authority offered to move the McNamara building to one of the Munchak lots in the four hundred block of Jefferson Avenue, but The Authority has failed to do so.

All other attempts to remove the McNamara house to another lot failed by reason of the S.R.A.'s inactivity.

5. The Condemnees objected to the fact that the Eminent Domain Code is unconstitutional, but this question has never been ruled upon by the courts.

(s) Henry M. Biglan
Attorney for Condemnees.

County of Lackawanna,
Commonwealth of Pennsylvania.

Henry M. Biglan swears to the truth of all the facts appearing in Paragraph 2 and Paragraph 3.

(s) Henry M. Biglan

In Witness Whereof, I hereunto set my hand and official seal.

(s) Carolyn Saar,
Notary Public

My Commission Expires Feb. 16, 1978
Office at Scranton, Lackawanna
County, Pa. (Seal)

County of Lackawanna,
Commonwealth of Pennsylvania

Mary F. McNamara swears to the truth of all the facts appearing in Paragraphs 4 and 5.

(s) Mary F. McNamara

In Witness Whereof, I hereunto set my hand and official seal.

(s) Carolyn Saar,
Notary Public

My Commission Expires Feb. 16, 1978
Office at Scranton, Lackawanna
County, Pa. (Seal)

[Endorsed:]
IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

No. 562 March Term 1969

In Re: Condemnation of Lands in City of Scranton
County of Lackawanna
State of Pennsylvania.

Mary F. McNamara and Anarita McNamara, 518 Adams Avenue, Ward 9, Block 30, Lots 16A & 17

PRELIMINARY OBJECTIONS

ORDER

To the Within Named Defendant (s): (Condemnor)

You are hereby notified to plead to the within Complaint within 20 days from the date of service hereof. You are hereby warned that if you fail to enter an appearance and file and ANSWER as above notifed and required, the cause will proceed without you, and you will be liable to have judgment entered against you in your absence.

(s) Henry M. Biglan
Attorney for Plaintiff
Condemnee
Ray A. Alberigi
Prothonotary,
Lackawanna County
1974 Oct 17 PM 4 27

Order of County Court

IN THE COUNTY OF LACKAWANNA
COMMON PLEAS COURT
CIVIL DIVISION—APPEAL

No. 562 March Term, 1969

In Re: Condemnation of Lands in the City of Scranton, County of Lackawanna, State of Pennsylvania

vs.

Mary F. McNamara and Anarita McNamara, 518 Adams Avenue, Ward 9, Block 30, Lots 16A & 17

Now, this 18th day of October, 1974, upon consideration of the defendants' Preliminary Objections to the Petition for Writ of Possession, it is hereby ordered that the Preliminary Objections are dismissed for lack of merit on their face.

By the Court
(s) Kosik, J.

Order of Commonwealth Court

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1522 C.D. 1974

In Re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania

and

TCS-1,
Intervening Appellee

Mary F. McNamara and Anarita McNamara,
Appellants

ORDER

Per Curiam:

Now, October 20, 1975, the order of the lower court is hereby affirmed.

Seal of the Commonwealth Court of Pennsylvania
Certified From the Record
October 20, 1975

(s) Frances C. Barbush
Chief Clerk

Order of Supreme Court of Pennsylvania

SUPREME COURT OF PENNSYLVANIA
Eastern District

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia, 19107
February 10, 1976

Mr. Henry M. Biglan
Star Route
Hop Bottom, Pa. 18824

In re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania, and TCS-1 Intervening Appellee.
Mary F. McNamara and Anarita McNamara, Petitioners.
No. 2153 Allocatur Docket

Dear Mr. Biglan:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal from Judgment of the Commonwealth Court, in the above captioned matter:

"January 28, 1976
Petition Denied
Per Curiam"

Very truly yours,
[Laura E. Litchard]
Deputy Prothonotary

LEL:mb
CC: Leo A. Southard, Esq.,
Joseph E. Gallagher, Esq.